A

PP

v.

MOHD NUR AZUAN MD ZAIN

B

HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[CRIMINAL APPEAL NO: MT(3) 42-23-2008]
8 SEPTEMBER 2008

C ***CRIMINAL PROCEDURE:*** *Sentence - Plea of guilty - Discount - Whether reduction in sentence automatic - Principles and application - Severity of offence committed - Public interest - Deterrent sentence - Whether considered - Whether sessions court judge considered all these factors - Whether sentence imposed by sessions court judge manifestly* D *inadequate*

CRIMINAL LAW: *Penal code - Section 376 - Rape - Sentence - Plea of guilty - Discount - Whether reduction in sentence automatic - Principles and application - Severity of offence committed - Public interest -* E *Deterrent sentence - Whether considered - Whether sessions court judge considered all these factors - Whether sentence imposed by sessions court judge manifestly inadequate*

This was an appeal by the public prosecutor ('appellant') against the decision of the sessions court judge ('SCJ') whereby the F respondent was convicted on his own plea guilty to a charge under s. 376 of the Penal Code and sentenced to ten years imprisonment. The primary issues raised by the appellant were (a) whether the learned SCJ had erred in law and in fact in giving an automatic allowance/discount to the plea of guilty and accordingly G had failed to have sufficient regard to the following factors (i) violence was used on the victim in addition to the sexual acts committed against her; (ii) the victim was only 15 years old when the offence was committed against her; (iii) the victim was raped on more than one occasion. The appellant also raised the issue as H to whether the sentence that had been imposed by the SCJ was manifestly inadequate. The respondent, in his submission, urged the court not to disturb the sentence imposed by the SCJ.

I

Held (setting aside sentence imposed by Sessions Court Judge):

(1) A guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justified such a consideration. Its application in favour of the accused depends on the circumstances of each case. There is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment. Whatever allowance or discount, if any, should be made in respect of a plea of guilty is a matter for the discretion of the court. There is no formal or rigid system of discounting. (paras 8 & 10)

(2) The offence to which the respondent had pleaded guilty contained many aggravating circumstances which required a deterrent sentence to be imposed on the respondent. Violence was used on the victim in addition to the sexual acts committed. The facts of the case showed that the accused forced the victim to mount his motorcycle. On the way to Lukut Cina's area, the accused held the victim's hands very tightly. When the victim tried to run at the scene of the incident, the accused managed to catch her. The accused also threatened to hurt the victim by using a helmet. The medical officer confirmed that the victim suffered bruises at her clavicles, elbows and knee. The victim was only 15 years old when the offence was committed against her and it was evident from the facts of the case that the victim was raped twice, at the same place, by the accused. (para 12)

(3) The court in imposing sentence in rape cases must take into consideration public interest which demand that deterrent sentence be given. The court should not discount the seriousness of rape as a crime. Rape is often accompanied with physical injury to the victim and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is a public injury as well. It is incumbent upon a judge to impose a just and appropriate sentence in rape cases to inspire the public confidence in the rule of law. The community must be protected from crime, and, where the exercise of this responsibility arises, the judge should have public protection at the forefront of his mind. (paras 14, 15 & 18)

(4) The sentence imposed by the learned SCJ was manifestly inadequate in the circumstances prevalent in this case. The sentence of ten years imprisonment and five strokes of cane did not reflect what had been handed down in other cases. The learned SCJ had erred in principle in imposing the sentence he did on the respondent. Accordingly, the sentence imposed by SCJ was set aside and substituted with a sentence of 16 years imprisonment and 10 strokes of the cane. (paras 20 & 21)

[Term of imprisonment to run from the date of arrest.]

Case(s) referred to:
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA
Costen [1999] 11 Cr App R (S) 182
Du Plooy v. HM Advocate [2003] SCCR 640
March [2002] 2 Cr App R (S) 448
Mohamad Senik v. PP [2005] 1 LNS 74
Muhamat Yassin Majali v. PP [2007] 1 LNS 567
Ong Lai Kim & Ors v. PP [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376 HC
PP v. Badron Zamanuddin [2005] 5 CLJ 493 HC
PP v. Shari Mohd Shariff [2005] 5 CLJ 439 HC
PP v. William Ayau [2005] 6 CLJ 289 HC

Legislation referred to:
Penal Code, s. 376

For the appellant - Husmin Hussin DPP
Respondent appeared in person

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zawawi Salleh JC:

The Appeal

[1] This is an appeal by the public prosecutor ("the appellant") against the decision of the learned Session Court Judge ("SCJ") made on 10 June 2008, whereby the respondent was convicted on his own plea guilty to a charge under s. 376 of the Penal Code and sentenced to ten years imprisonment and five strokes of cane.

The Charge

[2] The charge against the respondent was as follows:

> Bahawa kamu pada 01/02/2007 antara jam lebih kurang 9.00 malam hingga 12.00 malam di kawasan ladang kelapa sawit Lukut Cina, Jalan Lukut Cina di dalam Daerah Kota Tinggi, di dalam negeri Johor, didapati telah merogol seorang perempuan nama XXX KPT: XXX yang berumur 15 tahun 1 bulan. Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.
>
> (The name of the victim is substituted with [XXX] to protect her identity).

The Fact Of The Case

[3] The facts tendered by the prosecution (exh. P1) may be translated as follows:

3.1 On 1 February 2007, at about 9pm, the complainant and her friend, Mohd. Firdaus, went to a public phone booth located in front of Kota Tinggi Telekom Office. While they were there, the accused came towards them and scolded Mohd. Firdaus for staring at him. The accused then snatched Mohd. Firdaus motorcycle's key and threatened to beat him.

3.2 The accused forced the complainant to mount his motorcycle and asked her to show him Mohd. Firdaus's house if they want the motorcycle's key back.

3.3 Fear for her safety, the complainant followed the accused on his motorcycle. The accused brought her to PETRONAS station to refuel and then proceeded to an area called Lukut Cina.

3.4 The complainant tried to jump from the motorcycle but failed as the accused held her both hands very tightly.

3.5 Once they arrived at the place of the incident, the accused stopped his motorcycle. The complainant and the accused fell on the ground after the complainant struggled to escape.

3.6 The complainant tried to run but the accused managed to catch her. The accused then pulled the complainant beside a palm tree and pinned her down. The accused then used

his hand to hold the complainant's hands while another hand was used to take off the complainant's jeans. The accused also threatened to hurt the complainant by using a helmet.

3.7 The accused managed to take off the complainant's jeans and her underwear. Then, he took off his own pants and underwear.

3.8 The accused forced himself on the complainant. He thrust his penis inside her vagina. The complainant felt pain and wet at her vagina.

3.9 When both of them put on their pants, the complainant asked the accused where he came from and the accused said he lived in Kg. Makam. After that, the complainant was raped for the second time by the accused.

3.10 The accused then dropped the complainant off at a corner in Taman Aman near her house. The complainant then ran to her house.

3.11 Once the complainant reached her house, she told her family what had happened to her and described he facial and physical features of the accused. One of the villagers who was there said that he knew the accused and asked her to follow him to the accused's house. The accused was apprehended by the villagers and was handed over to the police.

3.12 On 2 February 2007, at about 1.40am the complainant who was also the victim in this case, lodged a police report against the accused at Kota Tinggi Police Station (Police Report No. 3949/07). The accused then was arrested on the same day.

3.13 The complainant was sent to the doctor on 2 February 2007. There were few fresh tears of the hymen at positions 5 and 7 o'clock. The tears were about 0.5 cm. There were also bruises at her clavicles.

3.14 The Chemist report confirmed that there were two DNA profiles from the semen found on the complainant's T-shirt, jeans and underwear. The tests conducted confirmed that the DNA profile for sperm cell belonged to the accused and the DNA profile for non-sperm cell belonged to the complainant.

3.15 Based on the police investigation and also the admission by the accused, it is evident that the accused had committed an offence punishable under s. 376 of the Penal code.

[4] The following exhibits were also tendered by the prosecutions:

(a) Facts of the case, (exh. P1);

(b) Kota Tinggi Report No. 3949/07, (exh. P2);

(c) Kota Tinggi report No. 3050/07, (exh. P3);

(d) The Birth Certificate of the victim, (exh. P4);

(e) The Identification Certificate of the victim, (exh. P5);

(f) Medical report, (exh. P6);

(g) Chemist report, (exh. P7);

(h) Sketch Plan and key, (exh. P8 and P8A); and

(i) Pictures of the scene of the crime and the exhibits, (exh. P9A to exh. P9V).

All these exhibits were admitted by the accused.

The Ground Of Appeal

[5] Although the petition of appeal contained several grounds, the primary issues raised by the appellant were as follows:

(a) whether the learned SCJ had erred in law and in fact in giving an automatic allowance/discount to the plea of guilty and accordingly had failed to have sufficient regard to the following factors:

(i) violence was used on the victim in addition to the sexual acts committed against her;

(ii) the victim was only 15 years old when the offence was committed against her;

(iii) the victim was raped on more than one occasion; and

(b) whether the sentence that had been imposed by the SCJ was manifestly inadequate.

[6] I shall now consider whether the SCJ had erred in principle in imposing on the respondent the sentence appealed against. The grounds of appeal are now separately discussed.

First Ground

[7] The fact that the respondent had pleaded guilty has always been considered as a mitigating factor. The rationale for making an allowance in respect of a plea of guilty was lucidly explained by Lord Justice General in *Du Plooy v. HM Advocate* [2003] SCCR 640 para [10], [11] and [12] as follows:

> [10] In England it is evident that there are two main justifications for making an allowance in respect of a plea of guilty. The first is the benefit of the plea to the administration of justice. Thus, in delivering the judgment of the Court of Appeal in *Byrne* [1997] 1 Cr. App. R. (S) 165, Ognall J at page 166 pointed out that by pleading guilty an accused saved a considerable amount of public time and expense. To this may be added the sparing of witnesses from having to attend the trial to give evidence (Hussain at paragraph 17). This factor is regarded as being of considerable importance in sentencing for sexual offences. In *Billam* [1986] 8 Cr. App. R (S) 48 Lord Lane LCJ stated, at page 51:
>
> > The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence.
>
> In *Millberry* [2003] 1 Cr. App. R 25, which was concerned with a case of rape, Lord Woolf LCJ stated at paragraph 27 that the first reason why courts made allowance for a plea of guilty and the stage in the proceedings when this happened was because it was known that victims of rape could find it an extremely distressing experience to give evidence in open court about what had happened to them, even where their identities were protected. In paragraph 28 he went on to say:
>
> > Obviously the distress which is avoided is greater the earlier the victim is informed so the discount should be reduced if there is not an early plea. There is also the fact that the plea demonstrates that the offender appreciates how wrong his conduct was and regrets it. While it is desirable to avoid taking up the time of the court and incurring expense unnecessarily, this is less important in mitigation than the other two factors we have just mentioned.

The other justification which is highlighted in the English decisions is the recognition of what is involved in an accused's acceptance of his or her guilt. Thus in *Byrne*, Ognall J, again at page 166, explained that the reasons for which a discount was traditionally given for a plea of guilty included the following (we omit the factor to which we have already referred):

> ... it is generally perceived as being the most cogent token of remorse and regret; secondly it is reinforced by the view that by pleading guilty a defendant inevitably forfeits whatever prospect he may have, however exiguous, of being acquitted by a jury ... and lastly, he demonstrates by his plea an acceptance of the justification that he should be punished for his wrongdoing.

[11] In Australia the courts have concentrated on the first of these main justifications in sanctioning an allowance in respect of a plea of guilty. In the decision of the High Court of Australia in *Cameron v. The Queen* [2002] 187 ALR 65 Kirby J at paragraph 65 said:

> The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount.

In paragraph 66 he described the main features of the public interest as being "purely utilitarian", illustrating this by reference to a wide range of costs and inconvenience which would be saved by the plea of guilty. In paragraph 67 he observed:

> It is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps to ease the congestion in the courts that delay the hearing of such trials as must be held. It also encourages the clear-up-rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws. A plea of guilty may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence.

A These factors appear to us to be relevant also in this jurisdiction.

[12] In the decision of the New South Wales Court of Appeal in *R v. Thomson; R v. Houlton* [2000] 49 NSWLR 383 it was emphasized by Spigelman CJ, who gave the leading judgment, that "instinctive synthesis" – which involved consideration of a
B wide range of "incommensurable, and sometimes conflicting objectives" – was the correct approach to sentencing (paragraph 55 and 57). He went on to point out that the benefits of a plea of guilty to the criminal justice system as a whole were concerned with the efficiency and effectiveness of that system. They required
C acknowledgment of some character by way of an incentive so that the benefits would in fact be derived by that system. "The public interest served by encouraging pleas of guilty for their utilitarian value is a distinct interest" (paragraph 122). On the other hand, the element of remorse which was said to be reflected in a guilty plea and the benefits to witnesses, particularly victims, were of a
D different quality. Remorse was directly concerned with the circumstances of the offender and might have significant implications for other objectives of the sentencing process. The plea of guilty of itself was equivocal with respect to remorse. Much greater weight might be accorded to conduct and statements
E which demonstrated a position of genuine and deeply felt contrition. It was not desirable to separate out the factor of such plea as an indication of remorse from other manifestations of remorse (paragraph 115-118).

[8] However, it has been decided that a guilty plea ought to be
F considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. Its application in favour of the accused depends on the circumstances of each case. There is no automatic rule that a guilty plea on its own entitles an accused to
G a lesser punishment. In a number of English judgments, notably *Costen* [1999] 11 Cr. App. R (S) 182 and *March* [2002] 2 Cr. App. R. (S) 448, there was a discussion of types of circumstances which may be unfavorable to the allowance in respect of a plea of guilty. According to the judgments, they include (i) where the
H imposition of a long sentence, if necessary the maximum is considered to be necessary for the protection of the public; (ii) where the seriousness of the offence is such that the public interest requires the imposition of the maximum sentence; (iii) where the plea of guilty is a tactical nature; and (iv) where the
I plea is practically inevitable (see *Costen* at pp. 184-185; and *March* at para 22).

[9] In the Malaysian Court of Appeal case of *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572, Augustine Paul JCA opined as follows: A

> However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441; *Lee Say & Ors v. PP* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v. PP* [1990] 1 LNS 146). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnely v. R* [1997] 91 A Crim R 550 at p 554: B C
>
> > A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances. The circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v. Public Prosecutor* [1979] 1 LNS 48; *Public Prosecutor v. Oo Leng Swee & Ors* [1981] 1 LNS 109). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v. Public Prosecutor* [1995] 1 SLR 537; *Public Prosecutor v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370). A guilty plea cannot also be a powerful mitigating factor when effectively no defence to the charge is available to the accused (see *Public Prosecutor v. Low Kak Wai* [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268). If a plea of guilty is made too late in the trial it may also cease to have mitigating effect (see *Public Prosecutor v. Dato' Nallakaruppan Solaimalai* [1999] 2 CLJ 596). The absence of mitigating factors in favour of the accused like, for instance, the existence of previous convictions may also deprive the guilty plea of its effect. There can therefore be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see *Public Prosecutor v. Tia Ah Leng* [2000] 5 CLJ 614). Be that as it may, where there is a departure from the general rule the reasons for not treating the guilty plea as a mitigating factor must be reflected in the grounds of judgment (see *Tan Lay Chen v. Public Prosecutor* [2000] 4 CLJ 492). D E F G H I

[10] To summarize, it is not in doubt that whatever allowance or discount, if any, should be made in respect of a plea of guilty is a matter for the discretion of the court. There is no formal or rigid system of discounting.

[11] In this instant appeal, the learned SCJ was correct in treating a plea of guilty as a mitigating factor. By allowing the respondent a discount for pleading guilty, the learned SCJ underscored the advantage of lightening the court's workload, this relieving delays and backlogs, saving the cost/expenses and inconvenience of trial and saving victim and witnesses from the trauma involved in giving evidence at the trial. I have no doubt that a plea of guilty in this case can be a significant mitigating factor. I would have little hesitation in imposing a sentence of 18 to 20 years on the facts of this case had the respondent put the victim to trial and the ordeal of giving evidence.

[12] However, the offence to which the respondent had pleaded guilty contains many aggravating circumstances which requires a deterrent sentence to be imposed on the respondent. They are:

(a) violence was used on the victim in addition to the sexual acts committed against her.

The facts of the case showed that the accused forced the victim to mount his motorcycle. On the way to Lukut Cina's area, the accused held the victim hands very tightly. When the victim tried to run at the scene of the incident, the accused managed to catch her. The accused also threatened to hurt the victim by using a helmet. The Medical Officer confirmed that the victim suffered bruises at her clavicles, elbows and knee;

(b) the victim was only 15 years old when the offence was committed against her, and

(c) the victim was raped on more than one occasion.

It was evident from the facts of the case that the victim was raped twice, at the same place, by the accused.

[13] The respondent, in his submission, urged the court not to disturb the sentence imposed by the SCJ. According to him, ten years imprisonment is a long time. Of course, every judge is aware that ten years imprisonment is a long time. He well knows that in many cases a prison term not only withers the life of the prisoner

but spreads like a stain in ever-widening circle, blighting the lives of innocent members of the family. Every judge is painfully aware of what ten years without a son may mean to a prisoner's mother. (The respondent's mother was present during the hearing of this appeal). But society must be protected, crime must be deterred, dangerous offender must be segregated and prisoners must be reformed.

Second Ground

[14] I am in agreement with the learned Deputy Public Prosecutor that the sentence that had been imposed by the learned SCJ was manifestly inadequate in the circumstances prevalent in this case. The sentence of ten years imprisonment and five strokes of cane does not reflect what has been handed down in other cases (see *Mohamad Senik v. PP* [2005] 1 LNS 74 (sentence of 18 years and 10 strokes of whipping upheld); *PP v. Shari Mohd Shariff* [2005] 5 CLJ 439; (sentence of 12 years and six strokes of whipping for each of the charge upheld); *PP v. Badron Zamanuddin* [2005] 5 CLJ 493, (sentence of 16 years and three strokes of whipping for each of the offence be varied to 16 years and six strokes of whipping for each of the offence) and *Muhamat Yassin Majali v. PP* [2007] 1 LNS 567 (sentence of 15 years and one stroke of whipping upheld).

[15] It is trite law that the court in imposing sentence in rape cases must take into consideration of public interest which demand that deterrent sentence be given. Rape is a serious crime. The court should not discount the seriousness of rape as a crime. It is a highly reprehensible, both in moral sense and in its almost total contempt for the personal integrity of the female victim. It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome that will and capacity of the victim to resist. Rape is very often accompanied with physical injury to the victim and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is a public injury as well.

[16] The offence of rape is a rampant offence in Malaysia justifying a deterrent sentence. Thus, in *Ong Lai Kim & Ors v. PP* [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376, Zakaria Yatim J (as he then was) observed:

> The offence of rape is rampant in this country. The court will be failing in his duty if it does not impose a deterrent sentence in this case. The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offence including the crime of rape should adequately reflect the revulsion felt by the great majority of society.

[17] Sulong Matjeraie J (as he then was) in *PP v. William Ayau* [2005] 6 CLJ 289 stated:

> There should be a "turning of tide" in favour of appropriate sentence for rape cases to reflect the abhorrence of society against rapists. This court takes judicial notice of the frequent reports in the national and local newspaper of incidents of rape. Sometimes these can be brutal and have understandably triggered an outpouring of rage with mounting public pressure to come down hard on rapists. Let the message be heard, loud and clear, that in this court there is zero tolerance of rape. No one who has committed an offence of rape can expect, upon conviction, to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be sentenced or punished with the maximum allowed by the law. The maximum sentence for this offence is not more than 20 years and shall also be liable to whipping.

[18] It is incumbent upon a judge to impose a just and appropriate sentence in rape cases to inspire the public confidence in the rule of law. The judge's duty to uphold the rule of law is of particular importance when the judge is dealing with the laws which protect the community from crime, such as rape cases. In this context the judge's preliminary responsibility is the protection of the public. The community must be protected from crime, and, where the exercise of this responsibility arises, the judge should have public protection at the forefront of his mind.

[19] The concept of rule of law is not mere legal gobbledygook. Perhaps it is not out of place in this context to remember the force of words attributed to Thomas More by Robert Bolt, chiding his son-in-law:

> This country's planted with laws from coast to coast – and if you cut them down – do you really think you could stand upright in the winds that blow them?

(See Speech by Sir Igor judge President of the Queen's Bench Division, "Public Protection", Lecture at King's College London, Monday, 20 November 2006).

Conclusion

[20] With respect, I am of the considered view that the sentence of ten years imprisonment and five strokes of cane passed by the SCJ was manifestly inadequate and also was not in line with the established sentencing principles in relation to rape cases.

[21] For the reasons adumbrated, I find that the learned SCJ had erred in principle in imposing the sentence he did on the respondent. Accordingly, the sentence imposed by SCJ is set aside and substituted with a sentence of 16 years imprisonment and ten strokes of cane. The term of imprisonment is to run from the date of arrest.